

DEPT. OF TRANSPORTATION
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TO: The Department of Transportation, Washington, D.C.

ATTENTION: Docket Section

FAX NUMBER: 001-202-493 2251

FROM: Sven Brise, Résidence Bleu-Léman, CH-1844 Villeneuve, Switzerland

FAX & TELEPHONE NUMBER: +41-21-960 2316

DATE: August 21, 1996

Dear Sirs,

MESSAGE CONSISTS OF 9 PAGES, THIS ONE INCLUDED

Please find attached my comments on Docket OST-95-232 "International Air Transport Association: Agreement relating to Liability Limitations of the Warsaw Convention" which I ask you kindly to convey to the appropriate Docket Clerk.

I will immediately proceed to send you, by express mail, the required number of 15 copies.

I will, in addition, send copies to the parties that I understand are entitled to receiving copies directly, namely

1. Chief, Transportation Energy & Agricultural Section

Antitrust Division

Department of Justice

325 7th Street, N.W.

Suite 500

Washington, D.C. 20530

2. David M. O Connor, Esq.

Director External Relations- United States

IATA

Suite 285 North

1001 Pennsylvania Avenue, N.W.

Washington, D.C. 20004

3. Robert P. Warren

General Counsel

ATA

1301 Pennsylvania Avenue, N.W.

Suite 1100

Washington, D.C. 20004-1707

I thank you for your attention,

Sincerely,



9pgs.

BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON , D.C.

10921
DA

International Air Transport Association:)
Agreements Relating to Liability)
Limitations of the Warsaw Convention)

Docket OST-95-232 -31

COMMENTS BY SVEN T. BRISE, CONSULTANT

Communications with respect to this document should be sent to:

Sven T. Brise
Consultant
Residence Bleu-Leman
CH-1844 Villeneuve
Switzerland

Telephone & Fax Number +41-21-960 2316

DATED: August 21, 1996

BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON , D.C.

International Air Transport Association:)	
Agreements Relating to Liability)	Docket OST-95-232
Limitations of the Warsaw Convention)	

COMMENTS BY SVEN T. BRISE, CONSULTANT

PERSONAL BACKGROUND

I have considerable flying experience as a military pilot, am a lawyer by education and a retired Executive Vice President of the Skandia Insurance Group, Sweden. I hold law degrees from the University of Lund, Sweden (LLB 1951) and Columbia University, U.S.A, (MCL 1956) where I majored in air law. My professional career includes employments in the Foreign Relations Divisions of the Swedish CAB and of SAS before joining the insurance industry.

Of particular interest in the present context is my work for IATA/ATA in 1967-70, as Coordinator of their self-insurance project, and my ongoing work in the International Chamber of Commerce, as Rapporteur to the ICC Commission on Air Transport and author of the ICC "Study on the Status and Future of the Warsaw System regulating Passenger Liability in International Air Transport" (1988) and of all subsequently issued ICC Policy Statements on Warsaw related issues. My other Warsaw consultation assignments include a Study, submitted in September 1991, for the Commission of the European Community on the "Possibilities of Community Action to harmonize Limits of Passenger Liability and increase the Amounts of Compensation for International Accident Victims in Air Transport".

I have throughout my career participated in numerous international seminars and conferences on the Warsaw subject, commenting on insurance related issues, and regularly attended recent meetings and consultative hearings held by ECAC and the EU on the subject of Warsaw reform.

THE ORIGIN OF THE IIA/MIA PROPOSAL

IATAs present package of Intercarrier Agreements can be traced back to discussions in Europe in the early 90s when IATA and ICAO still advocated adoption of the Montreal Protocols. ECACs discussions resulted in a recommendation to airlines, in June 1994, to develop an Intercarrier Agreement as a tried and time saving interim solution to preserve the Warsaw Convention as a globally uniform system. Paralell to the discussions in ECAC, the European Community explored possibilities of legislative action as far as EU Member States were concerned. ECACs stated main concern was to find a temporary solution which would raise the existing anacronistic passenger liability limits, thereby reducing the risk of a Warsaw break down and allowing ICAO to restart governmental efforts to modernize the treaty system. ECAC specifically mentioned SDR 250,000 as a minimum for any new passenger liability limit. The EU secretariate in its paralell efforts initially explored the merits of a substantially higher limit (ECU 600,000) before recently putting forward a proposal for Council Regulation, essentially reflecting the basic concept of IATAs IIA, i.e. a no-limit regime. U.S. strong preference for a no-limit regime, abandoning the Montreal Protocol 3 concept of limits combined with systems of supplemental compensation, has only gradually become known.

IATA is to be commended for trying to respond to these pressures, and for producing a set of Intercarrier Agreements. The procedures that have been followed -notably the lack of transparency which has characterized IATAs work- and the scope of the Agreements now submitted to the DOT for approval, are however open to criticism.

THE OBJECTIVE AND SCOPE OF THE IIA/MIA PACKAGE

If the objective is to maintain a globally uniform system, the IIA/MIA approach is likely to be counterproductive, firstly because it goes far beyond what is necessary for an interim agreement, secondly because it adopts a principle which conflicts with the key concept of the current system and thirdly because it predetermines the direction of future legislative work by governments. The latter aspect becomes worrying, not only because IIA/MIA conflicts with the registered preferences of many ICAO Member States but also because of the haste and resulting supression of alternatives which has characterized IATAs development of the IIA/MIA proposal.

The key element of the IIA, originally described by IATA as the "unspecified limits approach", goes counter to the opinions expressed by Member States in their replies to the recent ICAO Questionnaire (State Letter EC 2/73-95/7 of 24 February 1995). The analysis presented by ICAOs Secretariate (AT-WP/1769 of 4/1/96, paragraph 13) notes: "Most responding States (and carriers) from Africa/Carribean and Middle East favoured the adoption of a limit of SDR 100,000. On the other

hand most of the responding States from Asia/Pacific, Europe and North America favoured raising the limit to some SDR 250,000 or more, with three States: Japan, Switzerland and the United States, suggesting that there should be no limits." A preference for the concept of limits was also expressed in the guidelines to IATAs Secretariate, adopted by the Washington Airline Liability Conference, in June 1995

In their request for DOT approval, IATA describes its proposal in the following words: *"The IIA and MIA, taken together, will revolutionize the liability regime in international air transportation."* The statement offers an immediate reason for withholding approval of the proposed Agreements, on formal grounds and as a matter of principle. It is not for airlines to make international law, in a hurried and largely uncontrolled development process which has effectively excluded consideration of alternative solutions. The proposal is doubtful on other grounds as well. It is an extreme solution, which destroys the originally intended balance between passenger and airline interests under the original Warsaw treaty and, even more, in respect of the Treaty's secondary balancing functions, between individual members of different economic strengths *within* the two basic interest groups which the Treaty aims at regulating. These secondary balancing functions have gained in importance as the Treaty has been adopted by virtually all countries, powerful and small, rich and poor. It is respectfully submitted that IIA/MIA is a solution which goes too far to be compatible with the principles on which the Treaty is founded.

ON ECONOMIC CONSEQUENCES

As regards expected economic effects, IATA has stressed that consumers will be better off under a no-limit system as the need to break the limit will disappear. The point is true, only in a comparison between the proposed reform and the current order. That comparison is meaningless, however, since an overwhelming majority of parties have already agreed that present passenger limits must be updated. IATAs conclusion draws attention to the limited attention given to less revolutionary solutions. The failure in that respect tends to create illusions, both with regard to the breadth of support for IIA/MIA as well as to proper place and timing for attempts to revolutionize the liability regime. Given a choice in the form of an alternative, as outlined below, it is quite probable that it would attract broader support *as a temporary solution and awaiting proper legislative proceedings in ICAO*, than would the current IIA/MIA proposal, which turns ICAO into a puppet as far the direction and key elements for future legislative reform work.

My underwriting experience makes me believe that the reform that IATA promotes for global adoption will mostly benefit passengers from countries with high compensatory standards. Compared to an alternative with a passenger limit of, say, SDR 500,000 the beneficiaries would, if award levels remain stable, be found almost

exclusively among U.S. nationals. By contrast, the inevitable cost increases under a no-limit system are likely to fall most heavily on small airlines and airlines from countries with relatively modest compensatory standards. The reason for the feared uneven cost distribution is that major airlines with a high proportion of U.S. passengers are already, by law or in reality, exposed to and paying for unlimited liability, and therefore well positioned to argue that they should suffer no rate increases.

IATAs modest attempts to measure the cost impact of the no-limit system builds on verbal comments mainly offered by insurance brokers and practicing tort lawyers. Both these categories stand to gain from the higher claims and premium volumes that will be generated by a no-limit system. I firmly believe that the crucial problem of economic consequences needs to be analysed in a more convincing manner than has been the case so far. Failure to do so will give rise to doubts and possibly resistance by parties who, rightly or wrongly, see benefits and drawbacks from the IIA/MIA regime shared in an unfair and discriminatory way.

As regards the suggestion that settlement costs will decrease, because claimants will no longer have to prove "wilful misconduct" it deserves noting that the IIA restricts the regime for "strict" liability to such portion of claims which do not exceed SDR 100,000, unless the carrier has opted to extend the scope of its application of the strict liability regime. My fear is that optional variations in the scope of the strict liability regime and similar uncertainties regarding the availability of a "fifth forum" might create new uncertainties which will require legal advice and which in the end will offset any expected cost reduction.

IS THERE AN ALTERNATIVE?

In my view there is one. If speed and global support is essential, the ambition to introduce a revolutionary solution by way of Inter-carrier Agreements is, in spite of its immediate consumer appeal, counterproductive. If the aims include a high degree of global uniformity, and retention of ICAO as the forum for legislative changes, the international community would now be better served by the introduction of an updated Montreal Inter-carrier Agreement. To make the alternative tangible, I suggest that the limit be fixed at SDR 500,000 and that the geographical scope be defined as world wide, which would keep amendments within a well beaten and generally recognized track. As a temporary solution an alternative of this kind would constitute, not a revolutionary but nevertheless big and probably more generally acceptable step in right direction, with the added advantage of being in harmony with the basic concept of the current system

It is well understood, however, that a solution along such lines would fail to satisfy

U.S. interests. Some kind of additional agreement would therefore become necessary. Since already the IIA/MIA approach builds on the assumption that several secondary Inter-carrier Agreements might emerge for optional features one could see possibilities to address specific U.S. interests in a separate IA, covering traffic to/from/via the U.S.A. Alternatively, one might envisage U.S. legislation, modelled on the "Japanese solution", which would introduce a no-limit regime exclusively for U.S. carriers.

In a wider global perspective, and in order to bridge the gap between parties of unequal economic strength, the concept of passenger-paid systems for supplemental protection possibly but not necessarily as an individual yes/no option for the individual passenger deserves more attention. The concept is not intended to revive the systems once envisaged under Article 35A of Montreal Protocol 3 but rather as an application of the existing special contract provision under Article 22.1 of the Warsaw Convention. The difference between these approaches, notably in respect of practicality and cost implications, are explained in Section 3 of a Memorandum entitled Explanatory Comments on the "Three Tier Concept" which is attached as Appendix A. It is submitted that the indicated "three tier" approach would, if widely introduced, respond to U.S. policy objectives more effectively than the current IIA/MIA approach.

CONCLUDING REMARK

The Warsaw System was brilliantly described, in 1988, by the then U.S. Secretary of Transportation in a four word summary as "unpredictable, unfair, costly and confusing". I can only concur with that analysis and conclude that the objective should now be to create a viable interim solution which makes the system more predictable, fairer, less costly and less confusing. Looking at the IIA/MIA package in that light I believe that there are better and less revolutionary solutions available to safeguard U.S. policy interests, at the same time as the risk of disillusion and future conflict with numerous smaller countries and carriers would be greatly reduced. I therefore respectfully suggest that approval of the IIA/MIA proposal should be withheld until the indicated alternatives have been more thoroughly considered.

Respectfully submitted,



Sven T. Brise

Consultant

Residence Bleu-Leman

CH-1844 Villeneuve Switzerland

DATED: August 21, 1996

EXPLANATORY COMMENTS ON THE "THREE TIER CONCEPT"

1. THE FIRST TIER (FT)

.1 *FT cover is already applied worldwide with limits and terms set by the Warsaw/Hague treaties. FT protection is paid by the carrier. The cost is included in the ticket price. Passengers are made aware of limits through a Notice, routinely attached to the ticket document, in compliance with W/H Art. 5 (and CAB 18900).*

2. THE SECOND TIER (ST)

.1 *Like the FT, ST protection is carrier paid, with the cost included in the ticket price.*

.2 *ST protection is installed in many but not all countries, with passenger limits now at a variety of levels but mostly around SDR 100,000. ST protection is in most cases restricted to carriers of a given flag, who offer ST cover in compliance with national regulations. In one case (CAB 18900), the passenger limit has been introduced by carriers collectively, through a "voluntary" Inter-carrier Agreement, as a contractual commitment under the "special contract" clause of W/H Art.22.1. Precise ST terms are found in carriers' Conditions of Carriage.*

.3 *ST protection is now available in an increasingly complex pattern. Passenger awareness is low, not only for reasons of subject complexity but also for lack of timely and meaningful information. Carriers generally make no attempts to notify passengers beyond routine reference to Conditions of Carriage. The attitude is explained (1) by fear of administrative complications likely to cause cost increases, (2) by a wish to avoid inherently negative risk messages, and (3) by the general absence of specific notice requirements for contractually agreed protection in excess of treaty limits. The Montreal Agreement, backed by CAB Order 18900, is an exception, as the Order specifies a notice format which must be attached to each passenger ticket.*

.4 *Ongoing developments seem to offer an opportunity to move available ST protection towards greater uniformity, as the contemplated new Inter-carrier Agreement has the potential of attracting global adherence.*

3. THE THIRD TIER (TT)

.1 *Passenger paid TT protection in excess of the otherwise applicable FT and ST limits is currently not offered by any carrier, anywhere. However, several attempts have been made in the U.S. to develop "a system to supplement the compensation payable to claimants", in accordance with Art.35A of the now dormant Montreal Protocol 3.*

.2 *It is submitted that already W/H Art.22 would permit carriers to collect surcharges in return for raising or waiving liability limits. As regards the passenger limit, a valid*

passenger/carrier contract could be concluded, either through a *routinely offered yes/no option* for each individual passenger to "buy off" the limit, or through a *mandatory extension of the carriers' liability*. The choice between optional or mandatory TT cover would be up to governments. Mandatory TT cover would offer contributing passengers the same protection as does the "S-plan concept" under MP3, Art.35A, *except that the expected surcharge could well be lower for TT protection*.

.3 The TT surcharge could be *collected at the point of ticket sale and follow existing ticket accounting routines*. Surcharges would thus *accrue to airlines, thereby offsetting the higher passenger liability premiums that insurers might charge for increased limits*.

.4 Looking at cost effectiveness, TT protection differs fundamentally from S-plan cover in that it stems from an *extension of the carriers' liability*. TT cover is thus absorbed *within the framework of existing airline liability insurance policies*. By contrast, the U.S. S-plan concept foresees development of national supplemental compensation plans. *Such S-plans would by definition require new and relatively expensive insurance market capacity*, since their risk exposures would cumulate with the risk exposure under airlines' existing liability policies. Logically, *the "TT concept" should be more cost effective than the S-plan concept and probably allow the the surcharge to be fixed at a relatively modest level*.

.5 If combined with a reasonably high ST limit, it should be possible to set the TT surcharge at a *globally uniform level*. In its optional form, the "TT concept" might prove acceptable also to countries with relatively low compensatory standards, where a vast majority of citizens would be adequately compensated within the ST limit.

.6 It is submitted that the "TT concept", if universally adopted, might give an acceptable answer also to the DOT's demand that the system must offer U.S. citizens, anywhere, protection with no per passenger limit. If the U.S. authorities were prepared to accept *routinely offered options* for U.S. citizens buying their tickets abroad as a substitute for automatic inclusion under any mandatory plan for the U.S. market, then the "TT concept" *would have the added advantage of eliminating the cost increasing effect of the "extended coverage" feature* and thus lower the surcharge collected in the U.S. market.

.7 As regards notice requirements, it is felt that the "TT concept" would simplify the task of notifying passengers. Existing CRS technology makes it possible to give each individual passenger precise and meaningful information, at insignificant incremental cost.

.8 The TT concept would lend itself to application also in respect of declared value for registered passenger baggage, as stipulated in W/H Art.22.2. .951016